
Ottawa 1969

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OTTAWA VALLEY POWER COMPANY ..APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Income tax—Capital cost allowances—Pleadings—Ontario Hydro paying cost of converting supplier's plant—Whether supplier entitled to capital cost allowances—Whether "assistance from public authority"—Factual position not taken in notice of appeal—Leave to amend—Income Tax Act, s. 20(6)(h).

Appellant had a contract to supply 25 cycle power to the Ontario Hydro Commission until 1971 at $100,000 a month In 1956, following Hydro's decision to convert to 60 cycle, appellant agreed to supply 60 cycle power on the same terms, and Hydro agreed to pay the cost of converting appellant's plant to 60 cycle, the additions to the plant to be appellant's property Hydro paid $1,932,150 to convert appellant's plant, which amount was less than it would have cost Hydro to transform 25 cycle power to 60 cycle power. In its balance sheets appellant showed the cost of converting its plant as capital surplus, and for the taxation years 1959 to 1962 claimed capital cost allowance on that sum The allowance was refused on the ground that appellant incurred no capital cost In its notice of appeal appellant took the position that the cost borne by Hydro was appellant's consideration for giving up the right to deliver 25 cycle power for 14 years In argument however appellant took the position that by the 1956 agreement with Hydro it gave up a bargaining position worth the cost of the additions to its plant

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Held, appellant was entitled to succeed neither on the factual position taken in its notice of appeal nor on that taken in argument (even if the latter, not having been pleaded in the notice of appeal, was open to appellant).

Appellant should however have time to apply for leave to amend its notice of appeal to put forward another factual position, *viz* that in agreeing to supply 60 cycle power for 25 cycle power at the same price in consideration of being provided with the very substantial capital additions to its plant appellant from a commercial point of view gave full value for the new capital assets. If appellant applied for leave to amend its notice of appeal as suggested respondent should have the right to apply for leave to amend its reply to raise the question whether part or all of the value of the additions to appellant's plant should have been included in appellant's revenues for any of the years under appeal.

Corp. of Birmingham v. Barnes (1935) 19 T.C. 195 (H.L.); *Detroit Edison Co. v. C.I.R.* (1942) 319 U.S. 98; *Curran v. M.N.R.* [1959] S.C.R. 850; *City of London Contract Corp. v. Styles* (1887) 2 T.C. 239; *John Smith & Son v. Moore* (1921) 12 T.C. 266; *Canada Starch Co. v. M.N.R.* [1969] 1 Ex. C.R. 96; *Van Den Berghs Ltd v. Clark* [1935] A.C. 431; *Henriksen v. Grafton Hotel, Ltd* [1942] 1 All E.R. 678, referred to.

Held also, the payment by Hydro of the cost of the additions to appellant's plant was not "assistance from a...public authority" within the meaning of s. 20(6)(*h*) of the *Income Tax Act* and therefore excluded from the capital cost of those assets. Section 20(6)(*h*) has no application to an ordinary business arrangement between a public authority and a taxpayer.

INCOME tax appeal.

J. H. Laycraft, Q.C. for appellant.

Gordon V. Anderson and *I. Pittfield* for respondent.

JACKETT P.:—This is an appeal from the assessments of the appellant under Part I of the *Income Tax Act* for the 1959, 1960, 1961 and 1962 taxation years. The sole question involved is whether the appellant is entitled to capital cost allowance in respect of additions and improvements to its production plant made in the period from 1956 to 1960 at a total cost of $1,932,150.

The respondent's position is, in effect, that there was no capital cost of the additions and improvements "to the taxpayer" (*i.e.,* to the appellant) because such additions and improvements were made by Ontario Hydro at its own expense or, alternatively, any deduction of capital cost allowance is prohibited by section 20(6)(*h*) of the *Income Tax Act* because the appellant had received, from a public

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authority, assistance in respect of the additions and improvements in question equal to the capital cost thereof.[1]

Putting the facts in very simple terms, as I understand them, they may be summarized as follows:

1. Prior to a period in the 1950's, the Hydro-Electric Power Commission of Ontario (herein referred to as "Ontario Hydro"), in its business of producing or otherwise acquiring and distributing electrical power, utilized two different kinds of electrical power which may be referred to as 25 cycle power and 60 cycle power. These two different kinds of electrical power could not be used in the same lines or equipment.

2. During the 1950's, Ontario Hydro changed the part of its system that had operated on 25 cycle power so that it would operate on 60 cycle power;[2] and, to do so, had to carry out a very substantial programme of transformation in its own generating and distribution properties, and had to make consequential arrangements with its suppliers and the consumers of its power.

3. The appellant had a plant that was capable of producing 25 cycle power and had a contract under which it was entitled, and bound, to supply such power to Ontario Hydro for a period ending in 1971, and to receive therefor $100,000 per month; and it could have continued, with its then plant, to carry out that contract for the balance of the term.

4. If, after the change to 60 cycle power, Ontario Hydro had continued to take 25 cycle power from the appellant for the balance of the term of the appellant's contract, it would have cost Ontario Hydro, to transform that power so as to make use of it in its 60 cycle power system, at least $2,500,000 more than it would have cost it to use the same amount of power received as 60 cycle power.

5. For the appellant to deliver to Ontario Hydro, for the balance of the contract term, an amount of 60 cycle power equal to the amount of 25 cycle power that it was bound by the contract to deliver, involved a change in its generating equipment that would have cost it between $1,900,000 and $2,000,000.

6 After negotiations between the appellant and Ontario Hydro that lasted approximately a year, on October 22, 1956, Ontario Hydro and the appellant entered into two contracts. By one of those contracts, the existing contract between the appellant and Ontario Hydro for the supply of 25 cycle power was changed to a contract whereby the power to be supplied was to be 60 cycle power, but all other terms

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[1] Counsel for the respondent did not press other alternatives based upon sections 12(2) and 137(1) of the *Income Tax Act*, although they appear in the reply to the notice of appeal, because his position based on them depended on his succeeding in his contention that there was no capital cost of the additions and improvements to the appellant. If he is right in contending that there is no such capital cost, obviously he succeeds without relying on either section 12(2) or section 137(1).

[2] Some small parts continued to operate on 25 cycle power, but these were too remote from the appellant's plant to have any effect on the situation in this case.

were to remain the same. The other contract executed on the same day was a contract whereby, after a recital referring to the first of the two contracts and a recital that the parties had agreed "that this change in periodicity in alternations of current from 25 cycles per second to 60 cycles per second will make it necessary to alter... replace or do whatever may be necessary to permit frequency standardization at 60 cycles of the Company's existing 25 cycle generating units and facilities", the parties agreed that the Commission "at its own expense" would do such work. Paragraph 8 makes the intention clear. It reads:

> 8. The general intent of this Agreement is that the Commission itself and at its own expense shall perform or cause to be performed all the work required to change over the Company's existing generating units and facilities from 25 cycles to 60 cycles and that the Company shall not be put to any expense whatever in connection with the actual change-over operation.

Paragraph 4 makes it clear, also, that what is being done under the agreement is intended to add to the appellant's property rights. It reads:

> 4. The work and all materials and equipment necessary therefor and/or incorporated therein shall become and thereafter remain the property of the Company and the provisions of Clause 9 of the Power Contract shall not apply thereto, and the Commission shall furnish the Company with all details of the cost thereof and particulars of all materials and equipment retired and any salvage arising therefrom under Clause 3, hereof, so that the cost of the work and all adjustments necessary to give effect to this Agreement may be properly recorded in the Company's accounts.

7. What was done under the second of the two contracts executed on October 22, 1956, was done by Ontario Hydro at a cost of $1,932,150.

8. The appellant's balance sheet as of December 31, 1959, as attached to the appellant's 1959 income tax return, contains an item on the "Liabilities" side, reading

> Capital Surplus arising from the conversion of generating plant facilities from 25 to 60 cycle $1,857,575.00

and bears a note reading

> Note: The Property account includes $1,857,575.00, cost to date of conversion of generating plant facilities from 25 cycle to 60 cycle paid for by Hydro Electric Power Commission of Ontario under agreement with the company dated October 22, 1956.

The 1960 balance sheet contains the same item and note and the 1961 balance sheet contains the same item and note except that the amount of $1,932,150.00 has been substituted in them for the amount of $1,857,-575.00 in the item and note on the two earlier balance

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sheets. On the 1962 balance sheet, the item has disappeared and the note that was on the 1961 balance sheet is reproduced with an additional sentence reading

> The capital surplus arising from such transaction was distributed as a dividend in 1962.

The question that has to be decided is whether the appellant is entitled to capital cost allowance in respect of the additions and improvements so effected to its plant by Ontario Hydro.

The relevant provisions of the law are:

(1) Section 11(1)(*a*) of the *Income Tax Act*

> 11. (1) Notwithstanding paragraphs (*a*), (*b*) and (*h*) of subsection (1) of section 12, the following amounts may be deducted in computing the income of a taxpayer for a taxation year:
>
> (*a*) such part of the capital cost[3] to the taxpayer of property, or such amount in respect of the capital cost to the taxpayer of property, if any, as is allowed by regulation;

(2) Regulation 1100(1) of the Regulations made under the *Income Tax Act*

> 1100. (1) Under paragraph (*a*) of subsection (1) of section 11 of the Act, there is hereby allowed to a taxpayer, in computing his income from a business or property, as the case may be, deductions for each taxation year equal to
>
> (*a*) such amounts as he may claim in respect of property of each of the following classes in Schedule B not exceeding in respect of property
>
> (i) of class 1, 4%,
> (ii) of class 2, 6%,
> (iii) of class 3, 5%,
> (iv) of class 4, 6%,
> (v) of class 5, 10%,
> (vi) of class 6, 10%,
> (vii) of class 7, 15%,
> (viii) of class 8, 20%,
> (ix) of class 9, 25%,
> (x) of class 10, 30%,
> (xi) of class 11, 35%,
> (xii) of class 12, 100%,
> (xiii) of class 16, 40%,
> (xiv) of class 17, 8%,
> (xv) of class 18, 60%,
> (xvi) of class 22, 50%, and
> (xvii) of class 23, 100%.
>
> of the amount remaining, if any, after deducting the amount, determined under section 1107 in respect of the class, from the undepreciated capital cost to him as of the end of the taxation year (before making any deduction under this subsection for the taxation year) of property of the class;

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[3] There has been no suggestion that there is any difference between "cost" and "capital cost" in the circumstances of this case. I should have thought that where property is *acquired* as capital assets of a business there is probably no difference between the ideas of "cost" and "capital cost". The situation may be different where capital assets, such as goodwill or the supply contract in this appeal, arise as a result of the current operations of a business. If such a problem ever arises, it may become important to consider the French version of section 11(1)(*a*).

(3) Section 20(5)(*e*) of the *Income Tax Act*

(5) In this section and regulations made under paragraph (*a*) of subsection (1) of section 11,

* * *

(*e*) "undepreciated capital cost" to a taxpayer of depreciable property of a prescribed class as of any time means the capital cost to the taxpayer of depreciable property of that class acquired before that time minus the aggregate of

(i) the total depreciation allowed to the taxpayer for property of that class before that time,

(ii) for each disposition before that time of property of the taxpayer of that class, the least of

(A) the proceeds of disposition thereof,

(B) the capital cost to him thereof, or

(C) the undepreciated capital cost to him of property of that class immediately before the disposition, and

(iii) each amount by which the undepreciated capital cost to the taxpayer of depreciable property of that class as of the end of a previous year was reduced by virtue of subsection (2).

(4) Section 20(6)(*c*) and (*h*) of the *Income Tax Act*

(6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:

* * *

(*c*) where a taxpayer has acquired property by gift, bequest or inheritance, the capital cost to him shall be deemed to have been the fair market value thereof at the time he so acquired it;

* * *

(*h*) where a taxpayer has received or is entitled to receive a grant, subsidy or other assistance from a government, municipality or other public authority in respect of or for the acquisition of property, the capital cost of the property shall be deemed to be the capital cost thereof to the taxpayer minus the amount of the grant, subsidy or other assistance;

According to the evidence, there was, with one exception, no significant difference between the appellant's position after the change-over and its position before the change-over except that its sole activity after the change-over consisted in delivering 60 cycle power from a plant capable of producing such power, which it owned, whereas before that time its sole activity consisted in delivering 25 cycle power from a plant capable of producing such power, which it owned. Its revenues under the contract remained unchanged and its operating expenses and capital charges remained the same. Moreover, the cost of converting its plant had been paid by Ontario Hydro and had not cost the

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appellant a cent. The exception was that it had a plant that would, after 1971, produce power for which there would be a market whereas the plant that it had prior to the change-over would have had no economic utility after 1971.

By the notice of appeal, the basic position taken by the appellant, on the above facts, was as follows:

> 17. The Appellant says that the sum of $1,932,150 00 expended by The Hydro-Electric Power Commission of Ontario on work and material which became the property of the Appellant was not received by the Appellant as a grant, subsidy or other assistance but was consideration for the valuable capital right given up by the Appellant, namely a right to deliver a minimum of 96,000 Horse power of electrical energy at a periodicity of 25 cycles per second for the 14 years remaining in the term.
>
> 18. The Appellant says that by reason of the valuable right given up by it, the sum of $1,932,150 00 represents the true capital cost to it of the property within the meaning of paragraph (*a*) of subsection (1) of section 11 of The Income Tax Act.

By the reply, the respondent took the basic position that the appellant had not incurred any capital cost in respect of the additions and improvements in question.

During argument, the respondent's first position, as I understood it, was that there was no capital cost to the appellant of acquiring such capital additions and improvements to its plant and that the cost incurred by Ontario Hydro in making such additions and improvements to the appellant's plant could not serve as a basis for a reduction by the appellant under section 11(1)(*a*).

The appellant's position during argument, on the other hand, as I understood it, was that, when it embarked on negotiations with Ontario Hydro, it had a "bargaining position", that had a value to it, consisting of the fact that, if it insisted on its right to deliver 25 cycle power to Ontario Hydro, Ontario Hydro would be put to very substantial expense to make use of it and, as I understood the argument, when it gave up this bargaining position and agreed to deliver 60 cycle power in consideration of Ontario Hydro agreeing to effect the capital additions and improvements to its plant, it gave a consideration for the additions and improvements that was worth what it got for giving up that bargaining position. As will have been seen, this is different from the position set out in the notice of appeal, which was that the consideration given by the appellant for the addi-

tions and improvements was the surrender of "a valuable capital right", namely, "a right to deliver . . . electrical energy at a periodicity of 25 cycles . . . "

Before attempting to reach a conclusion as to whether there was a capital cost to the appellant of the additions and improvements, it is convenient to express my conclusion about the application to the facts of this case of section 20(6)(*h*) which, for convenience, I repeat:

> 20. (6) For the purpose of this section and regulations made under paragraph (*a*) of subsection (1) of section 11, the following rules apply:
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> * * *
>
> (*h*) where a taxpayer has received or is entitled to receive a grant, subsidy or other assistance from a government, municipality or other public authority in respect of or for the acquisition of property the capital cost of the property shall be deemed to be the capital cost thereof to the taxpayer minus the amount of the grant, subsidy or other assistance;

What this rule appears to contemplate is the case where a taxpayer has acquired property at a capital cost to him and has also received a grant, subsidy or other assistance from a public authority "in respect of or for the acquisition of property" in which case the capital cost is deemed to be "the capital cost thereof to the taxpayer minus . . . the grant, subsidy or other assistance". That rule would not seem to have any application to a case where a public authority actually granted to a taxpayer capital property to use in his business at no cost to him. Quite apart from the fact that the rule so understood would have no application here, I do not think that the rule can have any application to ordinary business arrangements between a public authority and a taxpayer in a situation where the public authority[4] carries on a business and has transactions with a member of the public of the same kind as the transactions that any other person engaged in such a business would have with such a member of the public. I do not think that the words in paragraph (*h*)—"grant, subsidy or other assistance from a . . . public authority"—have any application to an ordinary business contract negotiated by both parties to the contract for business reasons. If Ontario Hydro were used by the legislature to carry out some legislative scheme of

[4] I assume, for purposes of this discussion, that Ontario Hydro is a public authority within paragraph (*h*) without deciding that question.

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distributing grants to encourage those engaged in business to embark on certain classes of enterprise, then I would have no difficulty in applying the words of paragraph (*h*) to grants so made. Here, however, as it seems to me, the legislature merely authorized Ontario Hydro to do certain things deemed expedient to carry out successfully certain changes in its method of carrying on its business and the things that it was so authorized to do were of the same character as those that any other person carrying on such a business and faced with the necessity of making similar changes might find it expedient to do. I cannot regard what is done in such circumstances as being "assistance" given by a public authority *as a public authority*. In my view, section 20(6)(*h*) has no application to the circumstances of this case.

I turn now to section 20(1)(*c*) of the *Income Tax Act*, not because either party urged me to apply that provision to this case, because neither of them did so urge, but because I regard it as important to give some thought to that provision in attempting to get this particular type of problem in perspective. Section 20(6)(*c*) reads as follows:

> 20. (6) For the purpose of this section and regulations made under paragraph (a) of subsection (1) of section 11, the following rules apply:
>
> * * *
>
> (*c*) where a taxpayer has acquired property by gift, bequest or inheritance, the capital cost to him shall be deemed to have been the fair market value thereof at the time he so acquired it;

The obvious application of the word "gift" in this paragraph, particularly in association with the words "bequest" and "inheritance" is to gifts between individuals made for personal reasons.[5] Whether the *ejusdem generis* rule applies so to restrict it, I do not have to decide. I would have grave doubts, however, about applying paragraph (*c*) to capital equipment supplied free of charge by one business man to another for business reasons, even if the particular transaction were legally a "gift". If, for example, a soft drink manufacturer "gives" to retailers cabinets specially designed to hold his product and his alone, I should have no doubt that he would be able to reflect one way or another in

[5] Compare *Corporation of Birmingham v. Barnes*, (1935) 19 T.C. 195 per Lord Atkin at Pages 217-18.

his accounts the cost to him of such a programme of "gifts" carried on by reason of its commercial utility to him, and I should have grave doubt that the retailers would be able to get capital cost allowance on the "fair market value" of the articles given. The typical sort of case that paragraph (c) has in contemplation is where a father or other benefactor makes over to a son, or other similar object of benevolence, capital assets to be used in a business. It does not have for its object the giving of capital cost allowance to both of two business men when only one of them has had to incur the cost of acquiring them.

As I have already indicated, I have mentioned section 20(1)(*c*) to show why I do not think that it applies here even if it were a fair appraisal of the situation that Ontario Hydro had made a "gift" of the additions and improvements to the appellant.

My appraisal of the agreements made by the appellant with Ontario Hydro on October 22, 1956, does not result in a conclusion that Hydro made a "gift" to the appellant. It would be quite unrealistic to consider those two contracts as representing separate bargains by which, on the one hand, the appellant had gratuitously agreed to deliver 60 cycle power to Ontario Hydro until 1971 for a price of $100,000 per month instead of 25 cycle power, although delivering 60 cycle power would involve it in a capital expenditure of about $1,900,000 and, on the other hand, Ontario Hydro had gratuitously agreed to make capital improvements to the appellant's property that would cost about $1,900,000. So to regard the contracts as being independent of each other is to disregard the obvious commercial realities of the situation. On the one hand, the appellant only agreed to alter its supply contract from 25 cycle power to 60 cycle power because Hydro agreed to incur the cost of the capital improvements that had to be made to its production plant if it were to take on such an obligation and, on the other hand, Hydro only agreed to make such changes in the appellant's property at a cost to it of about $1,900,000 because the appellant agreed to deliver to it 60 cycle power instead of 25 cycle power.

However, such an appraisal of the bargain between the appellant and Hydro, represented by the two contracts of

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October 22, 1956, does not solve the problem as to whether there was a capital cost of the additions and improvements *to the appellant.*

The respondent says, with great force, that an analysis of the appellant's position before and after the change-over shows that the additions and improvements to its plant that enabled it to produce 60 cycle power instead of 25 cycle power cost it exactly nothing. The respondent might have added that this view is reinforced by the appellant's treatment of the acquisition on its own books. I find it very difficult to escape either the logic or the justice of the respondent's contention. The appellant did not have to make an expenditure of a single cent on capital account in connection with the change-over and, with exactly the same expenditures on revenue account after the change-over as it was making before, it had exactly the same revenues as it had before, and, in addition, it had a plant that would be a revenue producer to itself after 1971 whereas, before the change-over, it had a plant that would have been practically speaking valueless after 1971.

From the point of view of common sense and justice, I would have little hesitation in dismissing the appeal on the above analysis of the appellant's position.

Nor am I able to recognize any basis for taking a different view in the appellant's contention during argument that, by giving up its "bargaining position" it gave a consideration that involved a "capital cost" to it of about $1,900,000, even if this factual position had been pleaded in the notice of appeal so as to be open to the appellant. With great respect, it seems to me that this contention is based on a confusion of thought. I may have a good "bargaining position" when bargaining for a sale or other contract, but I do not sell or otherwise use this "bargaining position" as consideration. I use the "bargaining position" as a means of persuading the other party to give me more than he otherwise would for the property or other consideration that I have to dispose of. Here, as I see it, what the appellant had to offer as consideration was

(*a*) a surrender of its contract to supply 25 cycle power at a certain price until 1971, and

(*b*) the undertaking of an obligation to supply 60 cycle power on the same terms for the same period.

It certainly could not, as a business matter, have bound itself on these two matters unless it received in cash, or in some other form, the amount that it would cost to change its capital assets so that it could do what would be required if it did so bind itself. Its "bargaining position", on the other hand, as I see it, was that it would cost Ontario Hydro even more than the $1,900,000 odd if the appellant did *not* so bind itself.

Furthermore, I cannot accept the view of the facts that is put forward by the notice of appeal, which is:

> The Appellant says that the sum of $1,932,150 00 expended by The Hydro-Electric Power Commission...on work and material which became the property of the Appellant...was consideration for the valuable capital right given up by the Appellant, namely a right to deliver...electrical energy at a periodicity of 25 cycles...

which view of the facts was not relied on at the hearing or, at least, was not pressed with any vigour. It seems perfectly clear to me that Ontario Hydro would not have made the expenditure of almost $2,000,000 on the appellant's plant if all that it had received in consideration therefor was a surrender of the contract under which it had to take 25 cycle power. What Hydro got for the expenditure was a right to receive 60 cycle power instead of the 25 cycle power.

Having rejected both positions put forward on behalf of the appellant, it would seem that I might be satisfied that the appeal should be dismissed. However, even though no other case on the facts has been raised by the notice of appeal, I feel constrained to consider further what is the proper view of the facts, as they appear on the evidence that has been put before me, as I am not satisfied with the respondent's view that the appellant received the assets in question without cost to it.

The straightforward sort of bargain that might have been expected when the appellant was approached by Hydro in 1955 was that Ontario Hydro would pay to the appellant, for the desired amendment to the supply contract, whatever it might cost the appellant to effect the necessary change in its plant. Had that been the bargain that the appellant made with Ontario Hydro, the appellant would have incurred the capital cost of the additions and improvements and, even though it had been reimbursed

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by Hydro, it would have been entitled to capital cost allowance in respect of the capital cost it had so incurred.[6]

I see no escape from the position that, as I have indicated, would have flowed if the appellant had received the cost of the capital additions and improvements from Hydro as a consideration for amending the supply contract and had itself incurred the cost of the change-over in its plant, although I recognize that, superficially, it seems anomalous that, on an overall appraisal of what would have happened, it would have been able to pass on those capital costs to someone else.[7] In my view, the explanation is that, from a commercial point of view, if that had happened, there would be two aspects of the matter, *viz*,

(*a*) the appellant would have incurred capital costs for which it should have capital cost allowance, and

(*b*) the appellant would have received a payment from the purchaser of its power which should be taken into its revenues if it is part of the payment for which it has sold in the course of its business[8] or should be regarded as a capital receipt if, in the circumstances, it should be so characterized.

The next question is whether, assuming that I am right in concluding that the appellant would have been entitled to capital cost allowance if it had received the cash from Hydro and expended it on the capital additions and improvements itself, it is in any different position because the bargain took the form of Hydro undertaking to make

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[6] Compare *Corporation of Birmingham v. Barnes*, (1935) 19 T.C. 195 (H.L.). The opposite result was reached in a similar case in *Detroit Edison Co. v. C.I.R.*, (1942) 319 U.S 98, but it seemed to have been based on the fact that the payments were not taken into revenue even though "The payments were to the customer the price of the service". If the payments had been taken into revenue, it would seem that the Court might have reached the opposite result. This does not, therefore, seem to be a case where the actual point was decided on principle.

[7] The apparent anomaly disappears, of course, when one stops to consider that, if a business is well and successfully financed, all of the costs of the business, both revenue and capital, are, over the course of the business, recouped out of the charges to customers in one way or another.

[8] For a similar sort of problem where the lump sum payment was for services, see *Curran v. M.N.R.*, [1959] S.C.R. 850.

the expenditures in such a way that the additions and improvements would be made to the appellant's assets and belong to the appellant.

The transaction that actually took place and the transaction that might have taken place (under which the appellant would have been entitled to capital cost) come to the same thing from a commercial point of view. The question is whether this is a case where the result from a tax point of view depends on the way in which the result was achieved. I find it very difficult to reach a conclusion on that question where one has the complication of an existing supply contract that is to continue for a term being amended in consideration of a transfer of assets to be used as capital assets in the supplier's business.

It seems a little easier to analyze if one considers the somewhat simpler case of a supplier entering into a term contract with a purchaser under which the purchaser agrees to provide the supplier with his physical plant and to pay a fired price per unit for the commodity purchased instead of paying a larger price per unit without providing the supplier with his plant. In that case, my first impression is

(*a*) that what the purchaser is paying for what he is acquiring is the value of the plant supplied plus the price per unit paid and that the whole amount would have to go into the supplier's revenue account; and

(*b*) that the supplier is not getting his plant for nothing, but is paying for it by entering into the low-priced supply contract and that, *prima facie*, what he pays for the plant is the value of the plant.

If that be a correct analysis of the situation in the case of a new supply contract, it seems to me that the latter part of the analysis may have some application to the present problem. If the appellant had been pressed by Hydro to accept a revision of its supply contract from 25 cycle power to 60 cycle power, it would have had, normally, to insist on retaining its existing right to deliver 25 cycle power, which it could supply with its existing plant, or to

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insist on receiving a higher price per unit of the 60 cycle power because of the very substantial capital additions and improvements to its plant that would have been involved in producing the 60 cycle power. When it agreed to continue to accept the lower price for the more expensive power in consideration of being provided with the capital additions and improvements, it was, in effect, getting the additions and improvements in consideration of surrendering its right to deliver 25 cycle power and agreeing to provide 60 cycle power at a price lower than would otherwise have been economic. In the absence of evidence to the contrary, I am inclined to the view that what the appellant thus gave for the new capital assets is *prima facie* worth what the appellant got for it, that is, the value of the capital additions and improvements, or $1,932,150. However, I am not in a position to make any finding along these lines as this view of the facts was not raised by the notice of appeal.

Neither am I in a position to come to any conclusion on the question that was not raised as to whether the value of what was so received by the appellant should have been regarded in whole or in part as a revenue receipt. In so far as it was received in consideration for the surrender of its existing supply contract to supply 25 cycle power, it would seem that it might be regarded as having been received for surrender of a capital asset. Compare *City of London Contract Corp. v. Styles*[9] and *John Smith & Son v. Moore*.[10] I should have thought that that might be so even where the contract arose by virtue of the current operations of the business and was not acquired by virtue of a capital expenditure.[11] If the contract was a capital asset, such part, if any, of what was received as may properly be regarded as being merely the consideration for its surrender was presumably not received on revenue account. Compare *Van Den Berghs Ltd. v. Clark*.[12] In so far, however, as the capital additions and improvements were received as consideration for agreeing to deliver 60 cycle power at a price that was lower than would otherwise have been economic, I should be inclined to think that it was probably received

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[9] (1887) 2 T.C. 239.

[10] (1921) 12 T.C. 266.

[11] Compare the views that I expressed in *Canada Starch Co. v. M.N.R.* 1969—1 Ex. C.R. 96.

[12] [1935] A.C. 431.

on revenue account in accordance with the ordinary principles of commercial trading.[13]

The position is therefore that, having regard to the notice of appeal and the reply, and to the course that the matter took during the hearing, the appeal must be dismissed because the appellant has failed to establish that there was a capital cost to it of the assets in question on either of the two factual cases advanced by it.

However, in view of the alternative position or positions that, as it seems to me, might have been taken on the evidence before me and that, as far as I can appraise the matter, may have some merit, I will not pronounce judgment immediately, but will allow the appellant time during which it may, if it is so advised, apply for leave to amend its notice of appeal. If such an application is made, I will hear the parties as to whether an amendment, if granted, should be subject to terms as to further discovery or evidence or whether the court already has before it all evidence that might aid in determining the matter. If such an application is made by the appellant, it will also be open to the respondent to apply for leave to amend his reply to raise, as an alternative basis for supporting the assessments appealed from, the question whether some part or all of the value of the additions and improvements to the appellant's plant should have been included in the appellant's revenues for any of the taxation years under appeal.

If no such application is made within a period of thirty days, or if the appellant advises the Registry by letter earlier that it does not intend to make any such application, I shall render judgment dismissing the appeal with costs.[14]

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[13] I recognize that it is difficult to distinguish from such a receipt the case of a premium for a low-rental lease or a payment for a "monopoly" right which, at least in some circumstances, is treated as a receipt on capital account. Compare *Henriksen v. Grafton Hotel, Ltd.*, [1942] 1 All E.R. 678. Where such a payment is the consideration for the disposition of a property right such as a lease, I have no difficulty in regarding it as a capital receipt even though other payments, such as rent, arising out of the property, by virtue of their nature, are regarded as revenue payments. Where, however, all that is being disposed of by a person receiving a lump sum plus periodic payments is the stock-in-trade of his business to be delivered in the ordinary course of business, I have difficulty, at the moment, in seing how any of the payments can be regarded as being received otherwise than on current account.

[14] No application for leave to amend its notice of appeal was made by appellant, and the appeal was accordingly dismissed with costs—ED.